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CASES CITED

STATUTES, RULES AND LEGISLATIVE MATERIALS

TREATISES AND ARTICLES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 287

VICTOR RABINOWITZ and LEONARD B. BOUDIN,
Petitioners,

v.

ROBERT F. KENNEDY, Attorney General
of the United States

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

OPINION BELOW

The District Court issued no opinion. The opinion of the Court of Appeals is reported at 318 F. 2d 181, and is reproduced in the record at pp. 26-34.

JURISDICTION

The judgment of the Court of Appeals was entered on April 4, 1963 (R. 34). A timely petition for rehearing was denied on May 1, 1963 (R. 35-36). The petition for certiorari was filed on July 19, 1963 and was granted on October 14, 1963 (R. 36). The jurisdiction of the Court rests on 28 U. S. Code, Sec. 1254(1).

STATUTES INVOLVED

Foreign Agents Registration Act (Act of June 8, 1938; 52 Stat. 634; 22 U.S.C. 611 et seq., as amended: Section 611(a)):

As used in and for the purpose of this subchapter—

* * * * *

(b) The term "foreign principal" includes—

(1) a government of a foreign country and a foreign political party;

* * * * *

(c) Except as provided in subsection (d) of this section, the term "agent of a foreign principal" includes—

(1) any person who acts or agrees to act, within the United States, as, or who is or holds himself out to be whether or not pursuant to contractual relationship, a public-relations counsel, publicity agent, information-service employee, servant, agent, representative, or attorney for a foreign principal;

(2) any person who within the United States collects information for or reports information to a foreign principal; who within the United States solicits or accepts compensation, contributions, or loans, directly or indirectly from a foreign principal; who within the United States solicits, disburses, dispenses, or collects compensation, contributions, loans, money, or anything of value, directly or indirectly, for a foreign principal; who within the United States acts at the order, request, or under the direction of a foreign principal;

* * * * *

Section 612

(a) No person shall act as an agent of a foreign principal unless he has filed with the Attorney General a true and complete registration statement and supplements thereto as required by this section 2(a) and section 2(b) hereof or unless he is exempt from registration under the provisions of this subchapter.

Section 613

The requirements of section 612(a) of this title shall not apply to the following agents of foreign principals;

* * * * *

(d) Any person engaging or agreeing to engage only in private, nonpolitical, financial, mercantile, or other activities in furtherance of the bona fide trade or commerce of such foreign principal * * *.

* * * * *

Section 618

(a) Any person who—

(1) Willfully violates any provision of this subchapter or any regulation thereunder,

* * * * *

(2) . . . shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment for not more than five years, or both.

Declaratory Judgment Act (62 Stat. 964 as amended; 28 U.S.C. 2201):

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seek-

ing such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

QUESTIONS PRESENTED

1. Whether the petitioners, a law firm which represents a foreign government in purely mercantile and financial matters, and accordingly, are not required to register under the Foreign Agents Registration Act, may bring a declaratory action to challenge the Attorney General's demand that they register under that Act; or whether they are relegated to the alternatives of complying with the unlawful demand or submitting themselves to the hazards of an indictment and prosecution for failing to register.

2. Whether such a declaratory judgment action is a suit against the United States.

STATEMENT OF THE CASE

The petitioners are members of the bar of the State of New York, engaged in the general practice of law under the firm name of Rabinowitz & Boudin. According to the allegations in the complaint petitioners were retained on or about September 10, 1960 by the Republic of Cuba to represent that government in purely mercantile and financial matters; ther retainer does not cover advice and representation involving public relations, propaganda, lobbying or political or other non-legal matters and the petitioners have not in fact represented the Republic of Cuba in any respect other than in mercantile and financial matters (R. 3-4).

In August of 1961, the respondent, the Attorney General, demanded that petitioners register with him

in accordance with the provisions of the Foreign Agents Registration Act of 1938, as amended, herein called the Act. The petitioners maintained that their representation of the Republic of Cuba did not fall within the purview of the Act and so informed respondent. The respondent, nevertheless, insisted and continues to insist on his demand that petitioners register (R. 4).

Thereafter, the petitioners filed in the District Court below a complaint for a declaratory judgment declaring that their activities as representatives of the Republic of Cuba do not subject them to the requirements of registration under the Act (R. 3-5). The complaint alleged (R. 5) that these activities do not fall within the purview of the Act and are specifically exempted from the registration requirement of the Act by section 3(d) thereof, 22 U.S.C. § 613(d).

Attached to the complaint as Exhibit A (R. 7-15) is the registration form adopted by the Attorney General and which petitioners would be required to complete in order to fulfill the registration requirements of the Act. This form would require petitioners to disclose all of their businesses, occupations and public activities without regard to any relationship of these activities to their representation of the Republic of Cuba. Petitioners would be required to list all of their law clients and any other outside activities which they may have outside their law business and all talks, speeches, radio broadcasts which they may have made or articles or books which they may have written. The form also would require the petitioners to list all of their stockholdings or any other pecuniary interests in any corporation or any business enterprise, again without regard to whether or not these corporations or business enter-

prises had any relation to the representation of the foreign principal.

The complaint further alleged (R. 4-5) that the petitioners found it necessary to retain counsel in other states in connection with litigation in courts throughout the country. Attached to the complaint as Exhibit B was the Attorney General's Form No. FA-4 (R. 16-18) which respondent would require to be filed by all counsel associated with petitioners. This form would require all associate counsel to disclose all visits to or residences in foreign countries within the past 5 years; all clubs, societies, committees or other non-business organizations in the United States or elsewhere, of which they have been members, directors, officers or employees during the past 2 years; a brief description of all other businesses, occupations or business activities in which they are engaged; all speeches, lectures, talks, radio and television broadcasts delivered during the past 3 months and "all newspapers, magazines, articles, books, pamphlets, press releases, radio and television programs and scripts, and other publications distributed by them or by others for them, or in the preparation and distribution of which [they] rendered any services or assistance, during the past 6 months."

The complaint alleged that this registration requirement constituted a serious invasion of petitioners' privacy and that it would interfere with the petitioners' practice of law since other lawyers whom they would wish to employ or retain might refuse to accept such employment or retainer at the price of incurring a similar invasion of their privacy (R. 5). The complaint concluded that the petitioners were faced with the dilemma of submitting themselves to this unlawful

invasion of their privacy as a result of the unlawful demand of the Attorney General or in the alternative, resisting the demand and facing indictment and prosecution and possibly even conviction, if they were wrong in their judgment as to the law, for refusing to register. The complaint further alleged that indictment and prosecution, even without more, would seriously damage petitioners' reputation and interfere with their practice of law and their ability to employ and retain associate counsel (R. 5).

The Attorney General filed an answer in which he admitted that petitioners had been retained to represent the Republic of Cuba in its mercantile and financial interests, but denied any knowledge as to whether or not the representation went beyond the mercantile and financial interests of the foreign principal (R. 20). The answer further admitted that the Attorney General had demanded that petitioners register under the Foreign Agents Registration Act, that he had rejected petitioners' claim that they do not fall within the purview of the Act, and that he continued to insist that petitioners register. The answer further alleged that the failure of the petitioners to register as demanded subjected them to indictment, prosecution, and the imposition of criminal penalties (R. 20). The answer also specifically put in issue the legal question as to whether or not the activities of petitioners brought them within the purview of the Act (R. 20).

Respondent then moved for judgment on the pleadings, and his motion was denied by the trial court (R. 21-22). Subsequently, on respondent's motion consented to by the petitioners, the trial court amended its order, certifying, in accordance with 28 U.S. Code § 1292(b) that its order 'involves a controlling ques-

tion of law, as to whether individuals requested to register under the Foreign Agents Registration Act of 1938, as amended, may have their rights adjudicated by a declaratory judgment suit, . . . and that immediate appeal of this order may materially advance the ultimate termination of the litigation." (R. 22-23.) Thereafter the court of appeals below granted respondent's application for permission to appeal from the district court's order (R. 24), and reversed that order, holding that petitioners' action was a suit against the United States, Judge Fahy dissenting (R. 26-34). A timely petition for rehearing en banc (R. 35) was denied (R. 35-36).

SUMMARY OF ARGUMENT

I.

A. The suit was not barred by the sovereign immunity doctrine since it challenged the Attorney General's action as being beyond his statutory powers.

The statement in the majority opinion below that the complaint did not allege that the Attorney General's action was outside his statutory powers was plainly both captious and inconsistent with the Federal Rules of Civil Procedure. The petitioners were entitled to a liberal construction of their pleading and the presumption that the allegations of the complaint were true. Rule 8(f) of the Federal Rules provides that "All pleadings shall be so construed as to do substantial justice." Since Rule 8 of the Federal Rules requires that pleadings contain "a short and plain statement" of the case, it was unnecessary for petitioners to add to their complaint the legal argument that, since their activities were specifically exempted from the Act, therefore the demand for their registration exceeded the statutory

authority granted by the Act to the Attorney General. In any event the remedy called for was not dismissal of the complaint, but rather the granting of leave to amend.

The court below confused the capacity in which the Attorney General was sued. The Attorney General was sued in his capacity as the official charged with the administration of the Foreign Agents Registration Act. That he is also the chief law enforcement officer of the United States is not material here. Obviously, the result should be no different than would obtain if Congress had entrusted the administration of this particular statute to the Secretary of State rather than to the Attorney General. Nor does the fact that a possible criminal sanction is involved deprive the courts of jurisdiction.

Under the formula adopted by the court below that a government official has the statutory authority to construe his statutory authority erroneously, no action taken by a government official will exceed his statutory powers. In that event, every suit against a government official will be barred by the sovereign immunity doctrine.

B. An analysis of the cases demonstrates that the doctrine of sovereign immunity has been applied only in situations where the suit brought was for specific performance of a government contract, for government funds or for specific property in the possession of the government. This Court, as a matter of course, has assumed jurisdiction of multifarious suits challenging the validity of actions by government officials where no issue of government funds or property was raised. Nothing in the decisions of this Court justifies the holding below that, without regard to policy considerations

or the equities involved, the present suit was barred because granting the relief requested would "interfere with the public administration." The proper question is whether "the public administration" is "interfered" with in "an unwarranted manner." Resolution of this question in turn depends on the nature of the injury, the nature of the action challenged and the availability of other relief. On the basis of these considerations, the exercise of jurisdiction was fully justified by the Declaratory Judgment Act and traditional equity principles.

II.

The present action meets all the requirements for a declaratory judgment action. The controversy is definite and concrete, not hypothetical or abstract. It is real and substantial and touches the legal relations of parties having adverse legal interests. It admits of specific relief through a decree of a conclusive character.

The declaratory judgment procedure was created for just such a situation as the present. It was designed to permit a challenge to the validity or applicability of regulatory legislation so as to avoid the dangers and hazards of a criminal prosecution. In addition, the potential penalties faced by petitioners bring this case well within the traditional equity jurisdiction of the courts. There are not present here any of the considerations which normally lead to a court's refusal to entertain jurisdiction in a declaratory judgment action. There is no question here of federal interference with the enforcement of state statutes. This is not a case of an attempt to by-pass an administrative agency or an effort to secure an ad-

visory opinion based upon a hypothetical set of facts, or where the alleged injury is hypotheical and contingent upon speculative future action by an administrative agency. Nor are there any equitable or practical considerations which could justify the denial of declaratory relief.

ARGUMENT

I. THE COURT BELOW ERRED IN HOLDING THAT THE ACTION WAS BARRED AS AN UNCONSENTED SUIT AGAINST THE UNITED STATES

A. The Suit Was Not Barred by the Sovereign Immunity Doctrine Since It Challenged the Attorney General's Action as Being Beyond His Statutory Powers

We argue below that the doctrine of sovereign immunity barring suits against government officials does not in any event apply to a suit of the present character. However, assuming the applicability of the doctrine, the present action fits in one of the recognized exceptions. In *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, this Court held that even where the sovereign immunity doctrine is applicable it will not bar a suit which challenges the government official's action as being beyond his statutory powers, although it will bar a suit when the action taken is within the official's powers even if the action involved an error of law.[1]

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[1] For criticisms of this test as unrealistic and almost impossible to apply in practice, see Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review; Sovereign Immunity; Indispensable Parties, Mandamus*, 75 Harv. L. Rev. 1479 at 1485-8 (1962); Gellhorn and Byse, *Administrative Law Cases and Comments*, 354-55 (4th Ed. 1960); Carrow, *Sovereign Immunity in Administrative Law—A New Diagnosis*, 9 Journal of Public Law 1, 12-13 (1960); Jaffe, *The Right to Judicial Review I*, 71 Harv. L. Rev. 401, 433-437 (1958); Kramer, *The Place And Function of Judicial Review in*

The present action was brought against the Attorney General in his capacity as the government official charged with the administration of the Foreign Agents Registration Act. Petitioners alleged that since the Act specifically exempted their activities from its coverage, the respondent's demand that they register exceeded his statutory authority. Despite this clear allegation in the complaint, the majority below held that the action was barred because of sovereign immunity. Since its entire discussion of the point is buried in an obscurely worded footnote (R. 28, fn. 9), it is difficult to determine whether the majority decision rested solely on a pleading point, or whether it considered that, however well pleaded, the action would be barred as an unconsented suit against the United States. Either ground for the decision is clearly erroneous.

(1) The statement in the majority opinion that the complaint did not allege that the Attorney General's

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the Administrative Process, 28 Fordham L. Rev. 1, 15-17 (1959); Davis, *Suing the Government by Suing an Officer*, 29 U. of Chi. L. Rev. 435 (1962); Davis, *Sovereign Immunity in Suits Against Officers for Relief Other Than Damages*, 40 Cornell L. Q. 3 (1954). This Court also has consistently noted that its own decisions in this field cannot be reconciled. See *Cunningham* v. *Mason & Brunswick R. R. Co.*, 109 U.S. 446, 451; *Brooks* v. *Dewar*, 313 U.S. 354, 359-60; *Land* v. *Dollar*, 330 U.S. 731, 738; *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 698. The most recent comment on this point was in the dissenting opinion in *Malone* v. *Bowdoin*, 369 U.S. 643 at 650:

> "The Court is quite correct in saying that all of our decisions in this field cannot easily be reconciled; and the same will doubtless be true if said by those who sit here several decades hence."

For a discussion of the cases and their inconsistencies see 3 Davis, *Administrative Law Treatise*, Ch. 27, pp. 545-616.

action was outside his statutory powers was plainly both captious and inconsistent with the Federal Rules of Civil Procedure. Since the case was before the court on respondent's motion for judgment on the pleadings, the petitioners were entitled to a liberal construction of their pleading and the presumption that the allegations of the complaint were true, *Ickes* v. *Fox*, 300 U.S. 82; *Clark* v. *Uebersee Finanz-Korp*, 332 U.S. 480. Rule 8(f) of the Federal Rules provides that "All pleadings shall be so construed as to do substantial justice." See *Maty* v. *Grasselli Chemical Co.*, 303 U.S. 197, 200. As this Court stated in *Conley* v. *Gibson*, 355 U.S. 41, 48: "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."[2]

Since Rule 8 of the Federal Rules requires that pleadings contain "a short and plain statement" of the case, it was unnecessary for petitioners to add to their complaint the legal argument that, since their activities were specifically exempted from the Act, therefore the demand for their registration exceeded the statutory authority granted by the Act to the Attorney General.[3] Even if petitioners' legal theory had

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[2] See also 3 Moore's Federal Practice (2d ed.) 804:

"[P]leadings are not an end in themselves, but are only a means to the proper presentation of a case;—at all times they are to assist, not deter, the disposition of litigation on the merits."

[3] See *Siegelman* v. *Cunard White Star*, 221 F. 2d 189, 196:

"Under Rule 8, a pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief. It is not necessary to set out the legal theory on which the claim is based." (per Judge, now Justice, Harlan).

been erroneous, under the Federal Rules, they are not "stuck" with the erroneous theory but are entitled to whatever relief may be justified on the basis of the factual allegations in the complaint, 2 Moore's Federal Practice (2d ed.) 1713-5.

Finally, even if it be held that the validity of the complaint required the precise statement of the magic formula that respondent's action was "in excess of his statutory authority," obviously the remedy called for was not dismissal of the complaint, but rather the granting of leave to amend.[4] The court below was aware that petitioners were challenging the respondent's statutory authority to act as he did (R. 28, fn. 9) and should have decided the case on that basis, since a trial court's denial of leave to amend to include such an allegation would have constituted reversible error. *United States* v. *Hougham*, 364 U.S. 310; *Dowdy* v. *Procter & Gamble Mfg. Co.*, 267 F. 2d 827.

(2) The court below was also apparently of the view that even if the complaint had properly pleaded an excess of respondent's statutory authority, it would nevertheless have been insufficient. It reasoned as follows (R. 28, fn. 9):

> "The Attorney General, however, is charged with enforcement of all the criminal laws of the United States, 28 U.S.C. § 507. Such duty obviously carries with it the authority to construe the individual statutes and apply them to the facts before him. At most, [petitioners'] claim is that [respondent] has erred, or will err when construing the law."

[4] Since the trial court found no defect in the complaint, petitioners had neither the occasion nor the opportunity to apply for leave to amend under Rule 15(a) which provides that "leave shall be freely given when justice so requires."

This reasoning is fallacious on two grounds.

In the first place, the court confused the capacity in which the Attorney General was sued. The Attorney General was sued in his capacity as the official charged with the administration of the Foreign Agents Registration Act. That he is also the chief law enforcement officer of the United States is not material here. Obviously, the result should be no different than would obtain if Congress had entrusted the administration of this particular statute to the Secretary of State rather than to the Attorney General.[5] If, under such circumstances, petitioners would have been entitled to a declaratory judgment against the Secretary of State because of his erroneous and unauthorized interpretation of the statute, cf. *Perkins* v. *Elg*, 307 U.S. 325, petitioners should also be entitled to a declaratory judgment against the Attorney General. The contrary view amounts to an assertion that the Executive can oust the courts of jurisdiction over a controversy simply by transferring the function of administering a statute from one government official to another.

Nor does the fact that a possible criminal sanction is involved deprive the courts of jurisdiction. Thus this Court entertained jurisdiction of an action to restrain the Secretary of War from recommending a criminal prosecution, *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, and of an action brought jointly against the Interstate Commerce Commission and the United States Attorney to restrain a criminal prosecution, *Shields* v. *Utah Idaho Cent. R.R. Co.*, 305 U.S. 177. The *Shields*

[5] Congress did originally entrust the administration of the statute to the Secretary of State. The functions of administering the statute were transferred to the Attorney General by Executive Order, see Note prefacing 22 U.S.C. §§ 611 ff.

case involved a challenge to a finding by the Interstate Commerce Commission that a railroad came within the scope of the Railway Labor Act. Under the statutory scheme, the railroad, if subject to the Act, was required to post certain notices, and the failure to do so subjected it to criminal penalties. The Court stated as follows on the subject of jurisdiction (at 183-184):

> "Disobedience is immediately punishable and it is made the duty of the United States Attorney to institute proceedings against violators. Respondent has invoked the equity jurisdiction to restrain such prosecution and the Government does not challenge the propriety of the procedure. Equity jurisdiction may be invoked when it is essential to the protection of the rights asserted, even though the complainant seeks to enjoin the bringing of criminal actions . . . . [W]e think respondent was entitled to resort to equity in order to obtain a judicial review of the validity and effect of the Commission's determination purporting to fix its status."

Secondly, if the reasoning of the court below is to prevail, no case can ever be brought in which the claim that a government official acted outside his authority can be sustained. Every government official has the authority and responsibility to construe, in the first instance, the statutory powers conferred upon him. And it may be assumed that in all cases where the claim is made that he is exceeding his authority, the official is in good faith contending that he is not, and that the issue is an arguable one which requires judicial resolution. But the formula adopted by the court below that the official has the statutory authority to construe his statutory authority erroneously would in effect preclude all judicial review and oust the

courts of jurisdiction at the threshold.[6] If such is the case, no action taken by a government official will exceed his statutory powers, and hence every suit against a government official will be barred by the sovereign immunity doctrine. Obviously the *Larson* case does not stand for that proposition, especially since as we show more fully below, citizens have been consistently suing government officials in federal courts, see Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. Rev. 1 (1963).

B. The Doctrine of Sovereign Immunity Does Not Apply to Cases Such as the Present

We have shown that the court has jurisdiction of the action under the *Larson* sovereign immunity formula. But in any event an analysis of the cases in this Court demonstrates that, despite the sweeping language sometimes employed, the doctrine of sovereign immunity has been applied only in situations where the suit brought was for specific performance of a government contract, for government funds or for specific property in the possession of the government,

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[6] This view that a good faith construction of his statutory powers exempts a government official from judicial review of the validity of his actions was rejected by this Court as long ago as 1902, see *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94, 110-11:

> "Although the Postmaster General had jurisdiction over the subject matter . . . and therefore it was his duty, upon complaint being made, to decide the question of law whether the case stated was within the statute, yet such decision, being a legal error, does not bind the courts."

Cf. *Wilbur* v. *United States ex rel Krushnic*, 280 U.S. 306; *Harmon* v. *Brucker*, 355 U.S. 579.

see e.g. *Mine Safety Co.* v. *Forrestal,* 326 U.S. 371; *Land* v. *Dollar,* 330 U.S. 731; *Larson* v. *Domestic & Foreign Corporation,* 337 U.S. 682, *Malone* v. *Bowdoin,* 369 U.S. 643, cf. *Ickes* v. *Fox,* 300 U.S. 82. And numerous commentators have made the same observation.[7]

Beginning at least with *American School of Magnetic Healing* v. *McAnnulty,* 187 U.S. 94, it has been accepted virtually without question that the courts have jurisdiction over suits challenging the validity of actions taken by federal government officials where no issue of government funds or property was raised. And in *Stark* v. *Wickard,* 321 U.S. 288, 290, this was referred to as "the familiar principle that executive officers may be restrained from threatened wrongs in the ordinary courts in the absence of some exclusive alternative remedy . . . "

Applying that "familiar principle," this Court has, as a matter of course, assumed jurisdiction of multifarious suits challenging the validity of actions by government officials and indistinguishable in principle or theory from the present case. See e.g. actions challenging the validity of a harbor line established by Secretary of War, *Philadelphia Co.* v. *Stimson, supra;* action challenging the application of a test which would exclude the import of tea, *Waite* v. *Macy,* 246 U.S. 606; action challenging the classification of a railroad by the Interstate Commerce Commission, *Shields* v.

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[7] See, Jaffe, *op cit supra,* at 21, 29; Byse, *op cit supra* at 1485-6, 1528; Davis, *Sovereign Immunity in Suits Against Officers for Relief Other Than Damages,* 40 Cornell, L.Q. 3, 19-20 (1954); Carrow, *op cit supra;* Comment, 8 Stanford Law Rev. 683, 684-6 (1956); *The Sovereign Immunity Doctrine and Judicial Review of Federal Administrative Actions* (Note), 2 U.C.L.A. Law Rev. 382, 383 (1955). See also *Farrell* v. *Moomau,* 85 F. Supp. 125.

Utah Idaho R.R. Co., 305 U.S. 177; actions challenging the refusal of the Secretary of State to issue passports, *Perkins* v. *Elg*, 307 U.S. 325; *Kent* v. *Dulles*, 357 U.S. 116; suits challenging the validity of the discharge of government employees, *Service* v. *Dulles*, 354 U.S. 363; *Vitarelli* v. *Seaton*, 359 U.S. 535; *Cole* v. *Young*, 351 U.S. 536; *Peters* v. *Hobby*, 349 U.S. 331; *United Public Workers* v. *Mitchell*, 330 U.S. 75; an action challenging the character of an Army discharge, *Harmon* v. *Brucker*, 355 U.S. 579; an action challenging the Civil Service Commission's classification of hearing examiners, *Ramspeck* v. *Fed. Trial Examiners*, 345 U.S. 128; an action challenging the validity of regulations giving veterans priority in retention in the government service, *Hilton* v. *Sullivan*, 334 U.S. 323; an action challenging the lease of public lands, *Chapman* v. *Sheridan-Wyoming Coal Co.*, 338 U.S. 621.[8]

It is impossible to fit these cases into the formula distilled by the government and the court below from *Larson*, i.e., that a suit may be brought against a government official only when it is claimed that he is acting

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[8] The lower court also has, despite its decisions in the instant case, and in *Reisman* v. *Caplin*, 317 F. 2d 123, at the same time assumed jurisdiction in numerous other cases where government officials were defendants. See, e.g., *Deak* v. *Pace*, 185 F. 2d 997; *Born* v. *Allen*, 291 F. 2d 345 (government employee discharges); *Ingalls* v. *Zuckert*, 309 F. 2d 659 (challenge to validity of a resignation from the Air Force); *Morgan* v. *Udall*, 306 F. 2d 799; *Carl* v. *Udall*, 309 F. 2d 653 (challenges to the validity of leases of public lands); *Davis* v. *Board of Parole*, 306 F. 2d 801; *Josey* v. *Board of Parole*, 320 F. 2d 730 (challenging discretionary actions of Board of Parole); *McNamara et al.* v. *Dick et al.*, 323 F. 2d 276 (challenging refusal of Secretary of Defense to transfer Navy employees to other jobs); *Division 1267 etc.* v. *Ordman*, 320 F. 2d 729, (claim of abuse of discretion by General Counsel of the Labor Board).

beyond his statutory authority, but not when the claim is made that the official made a legal error. Thus in *Perkins* v. *Elg*, there was no question that the Secretary of State had the statutory authority and duty to deny passports to non-citizens. He also had the statutory responsibility to determine whether a particular applicant was or was not a citizen. The only issue in the case was whether or not he had wrongly decided that a particular individual was not a citizen. Nonetheless, this Court took jurisdiction of the case and held that the Secretary had wrongly decided the question. In the employee discharge cases such as *Service* v. *Dulles* and *Vitarelli* v. *Seaton, supra*, there was no question that the head of the department involved had the statutory authority to discharge the employees. The sole question was whether he had complied with the appropriate regulations in doing so (in both cases the regulations involved were those issued by the department head himself). Here too the Court took jurisdiction without even considering the question of sovereign immunity. Similarly in *Shields* v. *Utah Idaho Central R. Co.*, 305 U.S. 177, the Interstate Commerce Commission clearly had the authority to determine whether the plaintiff railroad was or was not an electric interurban railroad. The only issue was whether the Commission had properly exercised its authority on the facts.

As pointed out by Professor Jaffe,[9] it has not been the practice of this Court to resolve the question of sovereign immunity on the basis of a "grand abstraction" but rather on the basis of history and "our legal tradition. This tradition . . . tell[s] us that the sensi-

[9] Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 21, 28-9, 39 (1963).

tive areas—the areas where consent to suit is likely to be required—are those involving the enforcement of contracts, treasury liability for tort, and the adjudication of interests in property." The *Larson* case is no exception. Despite the language employed in the opinion,[10] the case was in fact an action for specific performance of a contract for the shipment of coal. The narrow issue was whether the plaintiffs could have equitable relief or were relegated to a suit for damages in the Court of Claims.[11] And the subsequent *Malone* opinion, which relied on *Larson*, was careful to note that the area of controversy was "suits against government agents specifically affecting property in which the United States claimed an interest" (at 646).

The issue of sovereign immunity has always been resolved on the basis of important policy considerations, see Douglas, J. dissenting in *Malone* v. *Bowdoin, supra* at 650, 653.[12] Foremost among these considerations is the "current disfavor of the doctrine of governmental immunity from suit," and the general policy to contract rather than expand the doctrine of sovereign immunity, see *Keifer* v. *Reconstruction Finance*

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[10] The unfortunate consequences resulting from the case of such broad language as in the decision of the court below was predicted. "The use of mechanical and unrealistic language, as in *Larson*, presents the danger that lower courts will rely on words and ignore underlying policies" *Sovereign Immunity and Specific Relief Against Federal Officers* (Note) 55 Colum. L. Rev. 74, 82 (1955).

[11] Only four Justices joined in the principal opinion. Justice Rutledge concurred only in the result, while Justice Douglas wrote a concurring opinion stating he agreed with the Court's opinion as applied to cases involving the sales of government property, see Justice Douglas' dissent in *Malone* v. *Bowdoin, supra* at 649-50.

[12] See also Byse *op cit supra* at 1530, Gellhorn & Byse, *op cit supra* at 354-55, and the dissenting opinion of Judge Fahy below at R. 33.

Corp., 306 U.S. 381, 391; *Federal Housing Administration* v. *Burr*, 309 U.S. 242, 245; *National City Bank* v. *Republic of China*, 348 U.S. 356, 359.[13] Nothing in the decisions of this Court justifies the holding below that, without regard to policy considerations or the equities involved, the present suit was barred because granting the relief requested would "interfere with the public administration."[14]

Whenever a suit is brought against a government official, granting the relief requested will "interfere with the public administration." This was certainly true of the numerous cases cited supra pp. 18-19, in which this Court took and exercised jurisdiction. As noted in the dissenting opinion (R. 32), the proper question is whether "the public administration" is "interfered" with in "an unwarranted manner." Res-

[13] For the virtually unanimous view of the commentators that the general and desirable trend is to narrow rather than expand the scope of the doctrine, see e.g. Jaffe, *op cit supra*, Byse, *op cit supra*, 3 Davis, *Administrative Law Treatise*, ch. 27; Gellhorn & Byse, *Administrative Law Cases and Comments*, 354-5 (4th ed. 1960); Davis, *Sovereign Immunity in Suits Against Officers for Relief Other Than Damages*, 40 Cornell L.Q. 3, 25, 35-39 (1954); Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 La. L. Rev. 476 (1953); Davis, *Suing the Government by Suing An Officer*, 29 U. of Chi. L. Rev. 435 (1962); Jaffe, *The Right to Judicial Review*, 71 Harv. L. Rev. 401, 420, 433 (1958); Carrow, *Sovereign Immunity in Administrative Law—A New Diagnosis*, 9 Journal of Public Law 1 (1960); Kramer, *The Place and Function of Judicial Review in the Administrative Process*, 28 Fordham L. Rev. 1, 17 (1959); Comment, 8 Stanford Law Review 683, 692-3 (1956).

[14] Curiously enough this particular phrase was taken from the opinion of Justice Douglas in *Land* v. *Dollar*, at 738, in which the claim of sovereign immunity was rejected. Justice Douglas' subsequent concurring opinion in *Larson* and dissent in *Malone* evidence that he had no intention of giving the language the scope attributed to it by the court below.

olution of this question in turn depends on the nature of the injury, the nature of the action challenged and the availability of other relief. Yet the court below rejected jurisdiction without considering any of these questions. Further, it reached this result despite the fact that this Court has usually taken jurisdiction in cases of this character, see e.g. *Shields* v. *Utah Idaho R.R. Co., Philadelphia Co.* v. *Stimson, Perkins* v. *Elg*, discussed *supra* pp. 15-16,[15] and although there is no precedent for refusing jurisdiction in cases such as the present.[16] Finally, as we show more fully below, the exercise of jurisdiction was fully justified by the Declaratory Judgment Act and traditional equity principles.

II. THE PRESENT CASE IS AN APPROPRIATE CASE FOR DECLARATORY JUDGMENT RELIEF

The present action meets all the requirements for a declaratory judgment action and indeed, as we shall show, the statute providing for declaratory judgment

[15] The court below considered it significant that "the named defendant" [in the complaint] is "The Attorney General of the United States" thus indicating that the suit was brought against the Attorney General in his official capacity (R. 27). But Rule 25(d)(2) of the Federal Rules of Civil Procedure provides that "When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name." See also 28 U.S. Code § 1391(e).

[16] In rejecting our contention that the sovereign immunity doctrine had not previously been applied to a case such as the present the court below stated (R. 28-29): "We are not aware that the doctrine of sovereign immunity is so circumscribed," citing in support of its conclusion four cases in this Court which in fact involved suits either for government funds or for specific property in the possession of the government, viz: *Land* v. *Dollar, supra; Ex Parte State of New York No. 1*, 256 U.S. 490; *Larson* v. *Domestic & Foreign Commerce Corp.*, *supra*; and *Stanley* v. *Schwalby*, 147 U.S. 508.

relief was designed to cover just such cases as the present. The requisites for a declaratory judgment action are set out as follows in the leading case of *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-241:

> "A 'controversy' . . . must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. . . . Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. . . . And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required."

The present action meets all of these tests;

a. The controversy is definite and concrete, not hypothetical or abstract. This is not a case where petitioners are seeking a court ruling either on a hypothetical set of facts or an abstract proposition of law. The issue posed by the proceeding is whether petitioners' representation of a foreign principal in purely mercantile and financial matters subjects them to the requirements of the Foreign Agents Registration Act. Respondent's

position in essence is that petitioners must register even though their representation is limited to mercantile and financial matters because their foreign principal is a foreign government.[17] Thus the concrete legal question presented on an actual existing state of facts is whether attorneys who represent a foreign government purely on mercantile and financial matters are required to register under the Foreign Agents Registration Act.[18]

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[17] As a matter of pleading, respondent's allegation in par. 4 of his answer (R. 20) that he lacks "knowledge [n]or information sufficient to form a belief" as to whether petitioners' representation of the foreign principal is limited to mercantile and financial matters raises an issue of fact to be determined at the trial. The fact that the trial court may be required to resolve disputed issues of fact is no bar to declaratory judgment relief. Anderson, *Declaratory Judgments* (2d ed. 1951) 374, 548. Indeed the existence of a factual dispute which may require resolution at a trial only serves to demonstrate that the case is concrete and definite and not abstract or hypothetical. See e.g. *Metropolitan Casualty Ins. Co.* v. *Richardson*, 81 F. Supp. 310.

It should be noted, however, that respondent's admission that he had no knowledge or information that petitioners' representation of the foreign principal was not limited to financial or mercantile matters shows that his demand that petitioners register was not based on the ground that their representation went beyond that alleged in the complaint.

[18] Although the issue on the merits as to whether petitioners are required to register is not before the Court, it is pertinent to note that the legislative history and the decided cases establish that Congress was concerned with registration by foreign agents in the area of propaganda or public relations and not where the representation of the foreign principal is limited to its mercantile and financial interests. See *Viereck* v. *United States*, 318 U.S. 236, 241-247, where this Court reviewed the legislative history of the Act. See also H. Rep. No. 1381, 75th Cong., 1st Sess., at p. 2; H. Rep. No. 1547, 77th Cong., 1st Sess., at p. 4: "The basic theory of the Act [is to require] complete disclosure by agents of foreign

b. The controversy touches the legal relations of parties having adverse legal interests. On the one side is the petitioners' right of privacy, their right not to make disclosure of their private affairs in response to an unlawful governmental demand, a right which has always received the protection of the courts, *Kilbourn* v. *Thompson*, 103 U.S. 168; *Interstate Commerce Comm.* v. *Brimson*, 154 U.S. 447; *Jones* v. *S.E.C.*, 298 U.S. 1, *F.T.C.* v. *American Tobacco Co.*, 264 U.S. 298.[19] In addition, as alleged in the complaint, the requirement of registration will impair petitioners' ability to retain associate counsel, and this will interfere with their right to practice law, clearly a valuable property right. On the other side, if petitioners are in fact required to register under the Act, the Attorney General as the chief law enforcement officer and the government official charged with the administration of the Act, has a legal interest and indeed a legal duty to require their registration.

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principals subject to registration who are engaged in propaganda and kindred enterprises" . . . so that "the recipients of such propaganda can properly appraise its worth." See also *United States* v. *Peace Information Center*, 97 F. Supp. 255; *United States* v. *Auhagen*, 39 F. Supp. 590, 591; *United States* v. *Kelly*, 51 F. Supp. 362. The basic contention of the respondent that the test for coverage is different where the foreign principal is a foreign government is not borne out by the language of the statute or by its legislative history. Moreover, the disclosures required by respondent's forms, *supra* pp. 4-6, although relevant to the registration of a propaganda or public relations agent, make no sense when demanded of a law firm whose representation is restricted to mercantile and financial matters.

[19] See also Brandeis, J., dissenting in *Olmstead* v. *United States*, 277 U.S. 438, 478: "The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

c. The controversy is real and substantial. The respondent has formally demanded that petitioners register. The petitioners have replied that their activities are not subject to the Act, and that they accordingly are not required to register. The respondent considered and rejected petitioners' legal position, and maintains his insistence that they register. This dispute is real, active, substantial and concrete. The opposing views would be presented in the litigation by adverse parties as clearly and as sharply as in any litigation.

d. The controversy admits of specific relief through a decree of a conclusive character. A decree by the District Court, assuming its finality after appeals, that the activities of the petitioners are not subject to the Act would end the dispute with finality. It would be binding upon the Attorney General. He would no longer insist on his demand that the petitioners register and the petitioners could continue their activities without the threat of indictment and prosecution.[20]

On the other hand, if the court issued a final judgment that the petitioners are subject to registration under the Act, this would also dispose of the matter with legal finality. Petitioners would not be permitted to relitigate this matter in any future criminal pros-

[20] Of course, petitioners would get no protection from the decree if they subsequently engaged in a representation of their foreign principal which went beyond its mercantile and financial interests. But that would also be true in the case of a criminal prosecution in which petitioners prevailed. The judgment in such a case would also give the petitioners protection only with respect to the type of activities covered by the case and not with respect to future activities of a different nature.

ecution. As a practical matter, there is no question that the petitioners would comply with the registration requirement since it would be clear that their legal position that they are not subject to the Act was no longer tenable.

The respondent argued below that petitioners are not entitled to declaratory relief because their action is in essence an action to enjoin a criminal prosecution and their complaint does not satisfy the requirements of such an action. This argument is fallacious for two reasons: (1) The declaratory judgment procedure was created for just such a situation as the present, and (2) Even if it were a prerequisite for relief that the case meet the requirements for injunctive relief, the facts set forth in the complaint satisfy those requirements.

(1) In his standard work, *Declaratory Judgments*, (2d ed. 1941), Professor Borchard[21] states that the declaratory judgment procedure was created for just such a situation as the present (at 906). He points out (at 1020) that one of the main and most beneficial functions of the declaratory judgment procedure is as a substitute for criminal prosecutions in the area of regulation of business practices. He further argues (p. 1021) that the civil procedure should be substituted for the criminal in an area not involving moral turpitude or *malum in se* particularly "where there is grave uncertainty as to what practices the general terms of a law prohibit." The same approach was set out in the Senate Report accompanying the

[21] Professor Borchard is generally acknowledged as the author of the Declaratory Judgment Act.

bill which later became the Declaratory Judgment Act.[22] Thus the Senate Judiciary Committee said in S. Rep. 1005, 73rd Cong., 2d Sess., pp. 2-3:

> "The [Declaratory Judgment] procedure has been especially useful in avoiding the necessity, now so often present of having to act at one's peril or to act on one's own interpretation of his rights, or abandon one's rights because of a fear of incurring damages. So now it is often necessary, in the absence of the declaratory judgment procedure, to violate a statute in order to obtain a judicial determination of its meaning or validity. Compare *Shredded Wheat Co.* v. *City of Elgin* (284 Ill. 389, 120 N.E. 248, 1918), where the parties were denied an injunction against the enforcement of a municipal ordinance carrying a penalty, and were advised to purport to violate the statute and then their rights could be determined, with *Erwin Billiard Parlor* v. *Buckner* (156 Tenn. 278, 300 S.W. 565, 1927), where a declaratory judgment under such circumstances was issued and settled the controversy."

And page 6 of the Report quoted with approval as underlying the purpose of the Declaratory Judgment Act the language of this Court in *Terrace* v. *Thompson*, 263 U.S. 197, 216:

> "They are not obligated to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights."

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[22] The Report acknowledges the Committee's debt to the work of Prof. Borchard at p. 2. For a contemporary view that the Declaratory Judgment Act was intended to afford relief in cases such as the present, see Borchard, *The Federal Declaratory Judgments Act*, 21 Virginia L. Rev. 35, 40, 43, 49-50 (1934).

In an article reviewing the early history of the Declaratory Judgment Act, Prof. Borchard wrote (Borchard, *Challenging "Penal" Statutes by Declaratory Action*, 52 Yale L.J. 445, 461 (1943)):

> "Possibly in no branch of litigation is the declaration more useful than in the relations between the citizen and the administration. With the growing complexity of government and the constantly increasing invasions of private liberty, with ever widening powers vested in administrative boards and officials, the occasions for conflict and dispute are rapidly augmenting in frequency and importance. Yet the very fact that such disputes turn mainly upon questions of law, involving the line marking the boundary between private liberty and public restraint, between private privilege and immunity, on the one hand, and public right and power, on the other, makes this field of controversy peculiarly susceptible to the expeditious and pacifying ministrations of the declaratory judgment. . . .
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> "The liability to be tried as a criminal is no 'remedy' but a hazard, which the law should help the much regimented citizen to avoid by construing and interpreting inhibitory statutes in a civil proceeding where possible."[23]

(2) Moreover, the potential penalties faced by petitioners bring this case well within the traditional equity jurisdiction which has led the Court to entertain suits

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[23] For illustrative state cases on the availability of the declaratory judgment procedure to determine the application to a plaintiff of particular regulatory and penal laws see *New York Foreign Trade Operators* v. *State Liquor Authority*, 285 N.Y. 272, 34 N.E. 2d 316; *Herald Publishing Co.* v. *Bill*, 142 Conn. 53, 111 A. 2d 4 and Anderson, *Declaratory Judgments* (2d ed. 1951) sections 644, 727, 728, 734.

for injunction or declaratory judgment, or a combination of those requests for relief, which challenged the validity or application of penal statutes. The threatened prosecution of attorneys-at-law for a felony entails not only a possible fine and imprisonment (the maximum fine and imprisonment under the statute is $10,000 and five years), but also damage to their reputation and impairment of their future ability to practice law. This is a more severe hazard than that involved in many of the cases in which jurisdiction was entertained. See e.g. *Philadelphia Co.* v. *Stimson*, 223 U.S. 605 (Corporation faced a potential fine of $2500 for building a bulkhead or wharf beyond a line established by Secretary of War. Statute also provided that structure would be removed); *Adams* v. *Tanner*, 244 U.S. 590 (Maximum penalty of $100 fine and 30 days imprisonment for taking a fee for finding employment); *Packard* v. *Banton*, 264 U.S. 140 (Statute made it a misdemeanor to operate passenger cars for hire without having furnished a personal bond or insurance policy in the amount of $2500 to cover liability for personal injury caused by defects in the vehicle. Opinion does not state the penalty imposed for violation).. *Shields* v. *Utah Idaho Central R. Co.*, 305 U.S. 177 (Statute imposed criminal penalties on carrier for failing to post certain prescribed notices under the Railway Labor Act. Opinion does not detail the size of the penalties); *Railway Mail Association* v. *Corsi*, 326 U.S. 88 (Maximum penalty of fine of $500 and imprisonment for 90 days for denying a person membership in a labor organization on grounds of race, color, or creed); *Evers* v. *Dwyer*, 358 U.S. 202 (Statute subjected Negro to prosecution for refusal to

sit in back of bus. Opinion does not state the penalty for violation).[24]

This does not mean that the courts will entertain jurisdiction over every action challenging the validity or applicability of a penal statute. Thus, the federal courts will not normally interfere with the enforcement of *state* statutes, particularly when some question is raised as to the proper interpretation of state law, *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450; *Watson* v. *Buck*, 313 U.S. 387; *Douglas* v. *Jeannette*, 319 U.S. 157; *Beal* v. *Missouri Pacific R. Co.*, 312 U.S. 45; see Davis, *Ripeness for Judicial Review, op. cit.* at pp. 1148-9. Since the present case involves the interpretation of a federal statute, the difficulties posed by the problems of federal-state relations have no bearing here.

And there may be other considerations, equally not applicable here, which would make a particular challenge to a penal statute not ripe for judicial review. There may be no actual controversy between the parties because the challeged statute was held in effect to have been repealed by desuetude as in *Poe* v. *Ullman*, 367 U.S. 497, or where a plaintiff, having failed to obtain an advisory opinion from the Attorney General as to whether a particular transaction violated a

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[24] For an exhaustive discussion of the cases, see the two-part article by Professor Davis, *Ripeness for Judicial Review*, 68 Harv. L. Rev. 1122, 1326, particularly 1145-1153 (1955). Prof. Davis distilled from the cases the following rule: Except where the case is otherwise not ripe for judicial review (see discussion *infra*), "A statute or a regulation which is enforceable through criminal prosecution should be subject to challenge in a suit for injunction or declaratory judgment brought by a party who is immediately confronted with the problem of complying or violating; risk of criminal penalties should not be exacted as the price of challenge" at 1368.

statute, requested the court to give an advisory opinion, as in *Helco Products* v. *McNutt*, 137 F. 2d 681, or where a plaintiff challenged in the abstract the validity of an administrative agency's general statement of policy, but made no showing that the policy applied to it and presented no concrete set of facts, as was the situation in *John P. Agnew Co.* v. *Hoage*, 99 F. 2d 349. And, of course, the courts will not grant declaratory or injunctive relief, where the alleged injury is hypothetical and contingent upon speculative future action by an administrative agency, as in *Eccles* v. *Peoples Bank*, 333 U.S. 426; or where a plaintiff attempts to bypass an administrative agency which is granted jurisdiction to consider the dispute in the first instance as in *Public Service Commission of Utah* v. *Wycoff Co.*, 344 U.S. 237.

With regard to the applicability of the Declaratory Judgment Act to the present case, the majority below stated (R. 29): "Philosophically, we may agree. But the Congress has decreed otherwise, at least so far as agents representing foreign governments are concerned." The opinion, however, does not state where or how Congress has so "decreed." There is in fact, no Congressional action which bars relief for petitioners. On the contrary, the only relevant Congressional expression on the question, the Declaratory Judgment Act, shows that it was Congress' intention that the courts take jurisdiction of cases such as the present.[25]

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[25] The majority below considered it significant that petitioners' "competent counsel, for reasons best known to themselves have decided not to raise the constitutional issue" resulting from the denial of a civil forum to test the applicability of the Act (R. 28 fn. 8). But counsel contended that a civil forum was available both under the Declaratory Judgment Act and traditional equity principles. Accordingly, petitioners had no cause to complain

Nor are there any equitable or practical considerations which could justify the denial of declaratory relief. There is no issue here of evasion or attempted secrecy. Petitioners do not deny that they represent the foreign principal; on the contrary, their complaint pleads (R. 3-5) that they represent the Republic of Cuba and that the appropriate governmental authorities have been so notified.[26] The issue is to be tried and decided in the same court that would determine any eventual criminal prosecution. There are no equitable or practical considerations that suggest that the issue could be better or more expeditiously or more fairly tried as a criminal matter rather than as a civil one.

CONCLUSION

The Attorney General is not entitled to, nor should he desire petitioners' registration if they are not required to register under the terms of the Act. And if petitioners' activities have been expressly exempted by Congress from the coverage of the Act, it does not "interfere with the public administration" for a court so to declare. On the other hand, there is certainly no equity in the argument that petitioners should be compelled to register, even though the law does not require them to, under the threat of a criminal prosecu-

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that Congress had unconstitutionally denied them a civil forum, because Congress had not done so. In essence, the court below denied petitioners relief because their "competent counsel" failed to anticipate that the court's ignoring of both the Declaratory Judgment Act and traditional equity principles would pose an otherwise non-existent constitutional issue.

[26] The Court will note that petitioners appear as counsel for the Republic of Cuba in a case pending in this Court, *Banco Nacional de Cuba* v. *Sabbatino et al.*, No. 16, this Term.

tion without being first afforded the opportunity of obtaining a judicial declaration on the validity of respondent's demand that they register.

The judgment below should be reversed, and the case remanded to the District Court to permit the consideration and determination of petitioners' complaint on its merits.

Respectfully submitted,

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